

# CONTINGENCY FEES IN PATENT LAWSUITS



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Individuals and small companies who own US patents encounter hurdles when faced with suing infringers, including the significant legal costs associated with representation. The issue of how a patent litigator will charge for such services is normally a difficult consideration in retaining an attorney. Attorneys' fees are generally charged on an hourly basis, a fixed fee basis, a contingency basis, or combinations thereof.

Patent litigation fees often reach millions of dollars, even in cases involving a single patent. Out-of-pocket costs, such as testifying expert fees, transcripts of proceedings, photocopying and legal research, may add up to tens or hundreds of thousands of dollars. Under these circumstances, the only viable avenue for a party without such financial resources may be to pursue high-quality representation under a contingency fee arrangement with willing counsel.

Unlike English law, under which a losing party in litigation is expected to pay the winning side's legal expenses, the US legal system has evolved to avoid the 'loser pays' requirement and to permit contingency fees. A contingency fee is normally payable only upon successful completion of the services, where there is a recovery or another favourable result. Recovery typically results from an award of damages or via a settlement. Without a recovery, there is no fee. Contingent fees are often calculated as a percentage of the client's net recovery, subject to their 'reasonableness' under local rules. Fee ranges of between one-quarter and one-third of a recovery are not unusual.

Clients seeking to retain patent litigation counsel on a contingency basis will significantly increase their chances of a better recovery by working with a seasoned attorney with many years of experience focused on patents. Factors influencing attorneys' consideration of such arrangements will include the probability of winning and the risk-to-reward ratio. They will generally screen opportunities and will turn down more cases than they accept. According to a quote attributed to Elihu Root by Mary Ann Glendon in *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society*: "About half of the practice of the decent lawyer consists in telling would-be clients that they are damned fools and should stop."

Some law firms, with an eye trained on reports of truly huge jury awards and settlements, may devote a percentage of their litigation work to patent contingency cases. Examples of extraordinary awards (subject to appeal) and settlement recoveries include:

- A Texas jury in 2009 awarded \$1.67 billion in damages against Abbott Laboratories for violating US Patent No. 7,070,775 (owned jointly by Johnson & Johnson subsidiary Centocor and NYU), covering anti-inflammatory drug Remicade. The case is on appeal

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- \$925 million was paid by Eastman Kodak to Polaroid in 1991 to settle a 15-year infringement litigation involving Polaroid's instant camera patents
- \$612.5 million was paid by Research in Motion to NTP in 2006 to settle multi-year litigation involving NTP's Blackberry patent rights
- \$388 million in damages was initially awarded by a Rhode Island jury in 2009 to Uniloc after trial in its case against Microsoft Corporation, based on infringement of US Patent No. 5,490,216, covering technology used to deter software piracy. The judge vacated this verdict, which is on appeal
- After a jury awarded over \$500 million to Eolas Technologies and the University of California against Microsoft Corporation, involving US Patent Nos. 5,838,906 and 7,599,985, covering embedded applications within Microsoft's Internet Explorer web browser, the parties settled
- \$290 million was awarded in 2009 to inventor Michel Vulpe against Microsoft Corporation for infringement of Vulpe's XML US Patent No. 5,787,449
- 3M in 1993 recovered \$129 million from Johnson & Johnson as part of a settlement of wilful patent infringement litigation, involving patent rights covering polyurethane-impregnated fibreglass orthopedic casts for setting bone fractures
- \$10.2 million was paid in 1990 by Ford Motor Co. to Robert W. Kearns after a jury found it to have infringed Kearns' intermittent windshield wiper patents.

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